FILED
FEB 17 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-593

In the Supreme Court of the United States

PAT OSBORN, PETITIONER

v.

BARRY HALEY; ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT BARRY HALEY

PAUL D. CLEMENT
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

BARBARA HERWIG
MARK W. PENNAK
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Attorney General's decision under the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 28 U.S.C. 2679(d), to certify that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose" (thus permitting the substitution of the United States for the employee as the defendant and the removal of the case to federal court) must accept the truth of the plaintiff's allegations.

2. Whether the Westfall Act's provision that the "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal" of the suit from state court, 28 U.S.C. 2679(d)(2), establishes that a district court is to retain jurisdiction over the removed suit, even if the court ultimately overturns the Attorney General's scope-of-employment certification for purposes of substituting the United States as the defendant.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Discussion 10
Conclusion 24

TABLE OF AUTHORITIES

Cases:

Aliota v. *Graham*, 984 F.2d 1350 (3d Cir.), cert. denied, 510 U.S. 817 (1993) 17

Borneman v. *United States*, 213 F.3d 819 (4th Cir. 2000), cert. denied, 531 U.S. 1070 (2001) 17, 21

Garcia v. *United States*, 88 F.3d 318 (5th Cir. 1996) . 17, 21

Green v. *Hill*, 954 F.2d 694 (11th Cir.), on reh'g, 968 F.2d 1098 (11th Cir. 1992) 18

Gutierrez de Martinez v. *Lamagno*, 515 U.S. 417 (1995) 2, 3, 19, 20, 23, 24

Haddon v. *United States*, 68 F.3d 1420 (D.C. Cir. 1995) 18, 21

Heuton v. *Anderson*, 75 F.3d 357 (8th Cir. 1996) 12, 13, 14

Kimbro v. *Velten*, 30 F.3d 1501 (D.C. Cir. 1994), cert. denied, 515 U.S. 1145 (1995) 8, 12, 13

McHugh v. *University of Vermont*, 966 F.2d 67 (2d Cir. 1992) 10, 12

Melo v. *Hafer*, 13 F.3d 736 (3d Cir. 1994) 8, 9, 12, 13

Mesa v. *California*, 489 U.S. 121 (1989) 22

Nasuti v. *Scannell*, 906 F.2d 802 (1st Cir. 1990) 18

Cases—Continued: Page

Osborn v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) 21
Republic of Austria v. *Altmann*, 541 U.S. 677 (2004) ... 22
United Mine Workers of Am. v. *Gibbs*, 383 U.S. 715 (1966) 20
United States v. *Cuomo*, 525 F.2d 1285 (5th Cir. 1976) 3
Verlinden B.V. v. *Central Bank of Nigeria*, 461 U.S. 480 (1983) 19, 20, 21, 22, 23
Westfall v. *Erwin*, 484 U.S. 292 (1988) 2
Williams v. *United States*, 350 U.S. 857 (1955) 6
Wood v. *United States*, 995 F.2d 1122 (1st Cir. 1993) 8, 10, 11, 12, 13, 14, 15, 16

Constitution, statutes and regulation:

U.S. Const. Art. III 19, 20, 21, 22, 23
Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 2
28 U.S.C. 2679(b)(1) 2
28 U.S.C. 2679(b)(2) 2
28 U.S.C. 2679(d)(1) 3, 12
28 U.S.C. 2679(d)(2) ..... *passim*
28 U.S.C. 2679(d)(3) 4, 12, 13, 22
Federal Tort Claims Act:
28 U.S.C. 1346(b) 2
28 U.S.C. 2671 *et seq.* 2

Statutes and regulation—Continued: Page

Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330 22
28 U.S.C. 510 3
28 C.F.R. 15.3 (1988) 3

Miscellaneous:

H.R. Rep. No. 700, 100th Cong., 2d Sess. (1988) 2

In the Supreme Court of the United States

No. 05-593

PAT OSBORN, PETITIONER

v.

BARRY HALEY; ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT BARRY HALEY

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 422 F.3d 359. The memorandum and order of the district court denying the motions for substitution and dismissal filed by the United States (Pet. App. 17a-25a) and the opinion and order denying reconsideration of that order (Pet. App. 12a-16a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered September 8, 2005. The petition for a writ of certiorari was filed November 7, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1988, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563 to override legislatively this Court's decision in *Westfall* v. *Erwin*, 484 U.S. 292 (1988). In *Westfall*, the Court held that, in order to obtain personal immunity from suit on tort claims, a federal employee must show both that he was acting within the scope of his employment and that he was performing a discretionary function. *Id.* at 299. The Westfall Act confers personal immunity on federal employees from all common-law tort claims arising out of acts taken within the scope of their employment, thus eliminating the discretionary function requirement of common law immunity under *Westfall*. See *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 425-426 (1995); H.R. Rep. No. 700, 100th Cong., 2d Sess. 4 (1988).[1]

The Westfall Act provides that the remedy available against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, for "injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment" is exclusive, and bars any damages action against the employee "arising out of or relating to the same subject matter." 28 U.S.C. 2679(b)(1). When a lawsuit is filed against a federal employee rather than the United States, the Westfall Act authorizes the Attorney General

---

[1] The Westfall Act excludes from its coverage suits against an employee "for a violation of the Constitution" and suits against an employee for a violation of a federal statute when "otherwise authorized." 28 U.S.C. 2679(b)(2).

or his designee to issue a certification that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. 2679(d)(1).[2] Once the Attorney General issues a determination that the employee was acting within the scope of his or her employment, the suit "shall be deemed an action against the United States" under the FTCA, and "the United States shall be substituted as the party defendant." *Ibid.*

If the suit was initiated in state court, the Westfall Act further provides that, upon the Attorney General's certification, the action shall be removed to federal district court, where it will proceed against the United States as the substituted defendant. 28 U.S.C. 2679(d)(2). The Act specifies that the Attorney's General certification "conclusively establish[es] scope of office or employment for purposes of removal." *Ibid.*

The Attorney General's decision to certify, or not to certify, that the employee was acting within the scope of his or her employment is reviewable by the district court. In *Lamagno*, *supra*, the Court held that the Attorney General's "scope-of-employment certification is reviewable in court" if the plaintiff challenges it. 515 U.S. at 420. The Westfall Act also expressly provides that if "the Attorney General has refused to certify scope of office or employment," the employee defendant may "petition the court to find and certify that the em-

---

[2] The Attorney General has delegated this authority by regulation to United States Attorneys, who make scope certification determinations in consultation with the Department of Justice. See 28 C.F.R. 15.3 (1988). The Attorney General's delegation authority is set forth in 28 U.S.C. 510. See, *e.g.*, *United States* v. *Cuomo*, 525 F.2d 1285, 1287-1288 (5th Cir. 1976).

ployee was acting within the scope of his office or employment." 28 U.S.C. 2679(d)(3).

If the employee petitions for review of the Attorney General's refusal to certify in a case that is pending in state court, the Attorney General may remove the case to federal district court, which must then resolve the scope-of-employment dispute. 28 U.S.C. 2679(d)(3). In contrast to removal after the Attorney General issues a scope certification—in which case, that certification is "conclusive[] * * * for purposes of removal," 28 U.S.C. 2679(d)(2)—the Westfall Act provides that where the Attorney General removes a case to defend against an employee's petition for judicial certification over the Attorney General's objection, "the action or proceeding shall be remanded to the State court" if the district court rejects the employee's petition, 28 U.S.C. 2679(d)(3).

2. Petitioner Pat Osborn was an employee of Land Between the Lakes Association (LBLA), which is contracted to provide services at the Land Between the Lakes National Recreation Area in Kentucky. The Recreation Area is administered by the United States Forest Service. Osborn applied for a job with the Forest Service, but was not hired. The Forest Service employee responsible for that hiring decision, Barry Haley, announced the hiring of another person in a meeting with LBLA employees at which Osborn was present. Osborn made comments to Haley at the meeting, in front of other employees, about the hiring decision that may have embarrassed Haley, and Osborn's supervisor shortly thereafter asked that she apologize to Haley. Osborn refused. Osborn later filed a complaint with the Department of Labor (DOL), questioning whether the Forest Service's hiring decision had given appropriate

consideration to veterans' preference points to which Osborn was entitled. The DOL investigator, Robert Kuenzli, consulted with Haley and found that the decision was handled properly. Thereafter, on the same day that the DOL investigator had called Haley, the executive director of LBLA summoned Osborn and demanded again that she apologize to Haley for her behavior at the May 20 meeting. Osborn again refused, and she was fired by LBLA two days later. Pet. App. 20a-21a.

3. Osborn filed suit in state court asserting claims (1) against LBLA and its executive director, Gaye Luber Gieselman, alleging that she had been terminated in violation of public policy in retaliation for inquiring with DOL about the handling of her veterans' preference points, (2) against Haley, alleging interference with Osborn's employment relationship with LBLA, and (3) against all the defendants, alleging conspiracy wrongfully to discharge Osborn and conspiracy to interfere with her employment relationship. Pet. App. 21a. The United States Attorney certified, under 28 U.S.C. 2679(d)(1), that Haley "was acting within the scope of his employment * * * at the time of the conduct alleged in the Complaint." August 20, 2003, Certification of Acting United States Attorney Monica Wheatley. The United States then removed the case to the United States District Court for the Western District of Kentucky and moved to dismiss the claims against the United States for failure to comply with the FTCA's administrative exhaustion requirement. Pet. App. 19a. In its motion to dismiss, the United States did not specifically deny "any of the factual allegations contained in Ms. Osborn's complaint." *Id.* at 22a. In response to the government's motion, Osborn submitted a copy of a Memorandum of Understanding between the Forest

Service and LBLA, which provided, *inter alia*, that Forest Service employees would not participate in the hiring or firing of LBLA employees. *Id.* at 23a. The United States emphasized in its reply that it did not dispute the specific facts that were alleged in Osborn's complaint but argued that Osborn could not overcome the presumption in favor of the Attorney General's certification decision by simply relying on an unsupported inference that Haley had called LBLA after the DOL inquiry and insisted that Osborn be fired. Mot. to Dismiss Reply 3-4.

The district court held that under Kentucky law, which governs the substantive question of scope of employment under the FTCA, *Williams* v. *United States*, 350 U.S. 857 (1955), the temporal proximity of the DOL investigation and Osborn's firing was "enough to raise [an] inference" that Haley had taken retaliatory steps to cause Osborn's termination. Pet. App. 24a. Further, the court found that, in light of the Memorandum of Understanding providing that the Forest Service would not participate in the hiring or firing of LBLA employees, "any interaction Mr. Haley might have had regarding Ms. Osborn's employment was out of the scope of his duties with the Forest Service." *Id.* at 23a. In addition, the district court held that Haley's alleged actions would not have furthered the Forest Service's interests or been a foreseeable result of his employment. *Ibid.* The court concluded that the "certification is inappropriate" and on that basis denied the United States' notice of substitution and motion to dismiss. *Id.* at 24a. The district court also held that the rejection of the United States' substitution deprived the court of jurisdiction over the suit and ordered the case remanded to state court. *Id.* at 24a-25a.

The government moved for reconsideration. In support, the government submitted declarations from both Haley and Luber, the LBLA director. Haley swore that he had not spoken with Luber between the time of the DOL investigation and Osborn's firing and that he did not "attempt to influence Luber's independent decision to fire Ms. Osborn." Haley Decl. 1-2. Luber similarly swore that Osborn's DOL complaint "was not and could not have been a factor in my decision to terminate Ms. Osborn, because I did not know it had occurred." Luber Gieselman Decl. 1. The government argued that the affidavits "provide ample evidence that Barry Haley never acted outside the scope of his employment and directly and specifically controvert any allegations to the contrary." Reconsid. Mot. 6. The government urged that those affidavits were sufficient, in the absence of contradictory evidence from Osborn, to support the U.S. Attorney's scope determination, or, at the very least, to warrant limited discovery and a hearing to resolve the disputed issue of fact. *Id.* at 7-8. Alternatively, the government argued that "discovery * * * could also reveal evidence supporting an argument that, even if the allegations are true, the alleged conduct falls within the relevant Kentucky law on scope" of employment. *Id.* at 8. The government continued, "[a]ssuming, for the sake of argument only, that Haley and Luber interacted regarding plaintiff's employment," the facts might support a conclusion that Haley's conduct was within the scope of Haley's employment under Kentucky law. *Ibid.*

The district court denied the motion to reconsider. Pet. App. 12a-16a. The court noted a circuit conflict on the question of how to deal with a Westfall Act certification that was "based on an argument that no harm-causing incident ever took place." Pet. App. 14a (citing

Wood v. *United States*, 995 F.2d 1122, 1124 (1st Cir. 1993) (en banc) (Breyer, C.J.) (holding that the certification "cannot deny the occurrence of the basic incident charged"), and *Kimbro* v. *Velten*, 30 F.3d 1501, 1508-1510 (D.C. Cir. 1994) (expressly rejecting *Wood* and holding that the district court must resolve the merits of the underlying dispute in such a circumstance), cert. denied, 515 U.S. 1145 (1995)). Purporting to follow the First Circuit's decision in *Wood*, the district court denied the United States' request for an evidentiary hearing on whether Haley had attempted to influence Luber's decision. Pet. App. 15a. The court also rejected the United States' request for discovery as to whether, in the alternative, there had been some interaction between Haley and Luber that was within the scope of Haley's employment. The court would not allow the United States to make arguments that were inconsistent with Haley's sworn declaration that no such interaction occurred. *Id.* at 14a.

3. On appeal, the Sixth Circuit reversed. Pet. App. 1a-11a. The court of appeals analyzed the appeal as presenting the question "whether district courts evaluating a scope certification can resolve material disputes about the facts 'upon which the plaintiff would predicate liability,' or whether instead courts must accept the plaintiff's allegations of such 'merits facts.'" *Id.* at 4a (quoting *Melo* v. *Hafer*, 13 F.3d 736, 742-743 (3d Cir. 1994)). The court of appeals noted that there was a clear split in the circuits on that issue. The court recognized that the First Circuit had held in *Wood* that "the Westfall Act does not permit judicial factfinding where the Attorney General's certification essentially denies the plaintiff's central allegations of wrongdoing, but instead requires courts to accept as true the plaintiff's allegations (as the

district court did here)," while allowing the Attorney General "to dispute the plaintiff's *description* of the tortious incident alleged—'incident-characterizing facts.'" *Id.* at 5a. The court of appeals observed, however, that the "majority" of circuits, including the D.C., Third, and Eighth Circuits, had rejected *Wood*. *Id.* at 6a-7a. The court of appeals then elected to "join the majority of the circuits" and held that "where the Attorney General's certification 'is based on a different understanding of the facts than is reflected in the complaint,' * * * including a denial of the harm-causing incident, the district court must resolve the factual dispute." *Id.* at 8a (quoting *Melo*, 13 F.3d at 747). The court of appeals cited, among other reasons, the need for the employee's immunity to be decided at the outset of the litigation and the difficulty of administering the *Wood* majority's distinction between denial of an incident and recharacterization of the incident. *Id.* at 6a-7a. The court of appeals therefore remanded to the district court for a hearing to "resolve the factual disputes underlying the scope question, including whether the alleged incident occurred." *Id.* at 11a.

The court of appeals also addressed the question whether, if substitution is ultimately not upheld, the district court must remand the case to state court for want of jurisdiction. The court held that, in light of the Westfall Act's language stating that the "certification of the Attorney General shall *conclusively* establish scope of office or employment for purposes of removal," 28 U.S.C. 2679(d)(2) (emphasis added), the "clear language of the Act forecloses remand." Pet. App. 10a. The court acknowledged, however, the "circuit split" on that issue as well. *Id.* at 8a-10a (citing decisions of the Third, Fourth, and Fifth Circuits holding that remand was im-

proper, and decisions of the D.C. and First Circuits holding that remand was required).

DISCUSSION

Petitioner correctly observes (Pet. 7-8, 13-14) that the courts of appeals are divided on two questions relating to judicial review of scope-of-employment certifications under the Westfall Act: (1) the extent to which the Attorney General's certification may depend upon a determination that one or more of the allegations of the complaint is untrue; and (2) whether, if the district court overrules the Attorney General's certification in a case that was removed from state court, the action must be remanded. While both circuit conflicts are somewhat stale and this case is in an interlocutory posture, on balance, the Court should grant review on both questions.

1. a. As petitioner states (Pet. 6), there is a conflict among the circuits with respect to whether the Attorney General may issue a Westfall Act certification based on a denial that the alleged incident occurred. In the first appellate decision to address the issue, *McHugh* v. *University of Vermont*, 966 F.2d 67 (1992), the Second Circuit stated, without elaboration, that the district court must, in resolving a contested scope determination, "assume that plaintiff's allegations are true," *id.* at 75, and construe them "in the light most favorable to the plaintiff," *id.* at 74. The court also stated that "the government may not deny that acts were within the scope of employment by denying that the acts occurred." *Ibid.*[3]

---

[3] The dissenters in *Wood* questioned whether those statements by the Second Circuit, in an opinion devoted primarily to other issues, reflected an intent to resolve the issue presented here. See *Wood*, 995 F.2d at 1136 (Coffin, Selya, and Boudin, J.J., dissenting). The Second Circuit does not appear to have confronted the issue of what allegations

In *Wood* v. *United States*, 995 F.2d 1122 (1993), the en banc First Circuit adopted a slightly different approach. The First Circuit held that the Attorney General's "certificate cannot assert 'immunity' simply by denying that anything occurred," but "must assume the existence of an 'incident out of which the claim arose.'" *Id.* at 1129. On the other hand, in contrast to the Second Circuit in the passages quoted above, the First Circuit concluded that the Attorney General was "free to dispute characterizations of the incident and subsidiary immunity-related facts," including factual allegations essential to the plaintiff's cause of action, such as an allegation that the employee caused the harm intentionally. *Ibid.* *Wood* provides that, in such cases, there should be a hearing in federal district court to resolve the factual dispute regarding the allegation. *Ibid.* The First Circuit saw that such an exception to the general rule it announced was necessary because a plaintiff might otherwise, "through artful pleading, transform a job-related tort into a non-job-related tort," and "federal employees [would] lose, in practice, the job-related immunity that Congress clearly intended the Westfall Act to provide." *Ibid.* The *Wood* majority acknowledged that this necessary limitation on its rule presented an "administrative problem" of line-drawing, *ibid.*, which was one reason the dissenters argued for rejecting the majority's approach altogether, *id.* at 1136 (Coffin, Selya, and Boudin, J.J., dissenting).[4]

---

the Attorney General must accept in making his scope certification since *McHugh* issued. We assume, for purposes of argument, that the Second Circuit's statements quoted in the text constitute a holding.

[4] Although the majority in *Wood* stated (995 F.2d at 1128, 1129) that its approach was the same as that of the Second Circuit in *McHugh*, the Second Circuit's opinion appears to limit the Attorney General's

Since *Wood*, every court of appeals to reach the question has held that the Attorney General is free to base a scope-of-employment certification on his own assessment of the facts, even if contrary to the central allegation of the complaint, and that the federal court must conduct a factual inquiry. In *Melo* v. *Hafer*, 13 F.3d 736, 746 (1994), for example, the Third Circuit held that "the Attorney General may file a scope of employment certificate based on a finding that the defendant did not engage in the conduct alleged by the plaintiff." The D.C. Circuit similarly held in *Kimbro* v. *Velten*, 30 F.3d 1501 (1994), cert. denied, 515 U.S. 1145 (1995), that "the statutory language describing certification does not preclude a disavowal through certification that the harm-causing event actually occurred." *Id.* at 1508. See *Heuton* v. *Anderson*, 75 F.3d 357, 360 (8th Cir. 1996). The Sixth Circuit concurred in that view. Pet. App. 8a.

The courts that have rejected *Wood* have emphasized two principal points. First, the courts have noted an inconsistency between the *Wood* analysis, which was based on the language of Section 2679(d)(1), and Section 2679(d)(3), which the *Wood* majority did not discuss. Section 2679(d)(1) provides that the United States shall be substituted if the Attorney General certifies that the defendant employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose." In the First Circuit's view, that language implies that the Attorney General must assume the occurrence of some "incident" underlying the plaintiff's claim. 995 F.2d at 1123, 1125-1126. Subsequent decisions have emphasized that the district court's

---

certification to the facts alleged, and permits a factual inquiry only with respect to the "context of the alleged acts" as they are relevant to the scope-of-employment issue. *McHugh*, 966 F.2d at 74.

authority to make a scope-of-employment determination at the request of a defendant employee pursuant to 28 U.S.C. 2679(d)(3) does not have the "time of the incident" language on which the First Circuit relied. See *Melo*, 13 F.3d at 746-747; *Kimbro*, 30 F.3d at 1508; *Heuton*, 75 F.3d at 360; Pet. App. 6a-7a. As those other courts of appeals have observed, it is unlikely that Congress intended the Attorney General to be more circumscribed by the plaintiff's allegations than the district court is when it makes a scope-of-employment determination at the behest of the defendant. *Ibid.* In addition, the later appellate decisions have emphasized the practical, as well as theoretical, difficulty in drawing the kind of distinctions "between *characterization* of an incident and *denial* of an incident" required by *Wood*, *id.* at 6a; *Kimbro*, 30 F.3d at 1507; *Melo*, 13 F.3d at 743, 746, something that the *Wood* majority itself acknowledged, 995 F.2d at 1129.

b. Petitioner frames the first question presented in a manner that appears to set to one side the approach suggested by *McHugh*, under which the Attorney General must accept all of the allegations of the plaintiff's complaint and construe them in the light most favorable to the plaintiff, by posing the question in the terms employed by the First Circuit in *Wood*: whether the Attorney General may "deny[] that such incident occurred at all." Pet. i. In addition, petitioner claims that "the present case does not raise what the First Circuit in *Wood* called a potential 'administrative problem' that can arise when the court confronts 'the difference between denying facts that amount to a 'characterization' or 'description' (which *Wood* permits the Attorney General to do) and 'denying that any harm-causing incident occurred at all' (which is foreclosed by *Wood*)," Pet. 19 (quoting 995

F.2d at 1129-1130).[5] In fact, however, the "administrative problem" noted by *Wood* is fully evident on the facts of this case. Indeed, the Sixth Circuit's order remanding this case to the district court for an evidentiary hearing would have been appropriate even under the approach in *Wood*.

The First Circuit acknowledged in *Wood* that the Westfall Act does not require the Attorney General to concede as fact that the alleged incident occurred, but merely to "assume" that it did "for immunity-asserting purposes." 995 F.2d at 1126. See *id.* at 1129; *id.* at 1125 (certification must "claim that a (hypothetically conceded) 'incident' involved activity that was 'within the

---

[5] Petitioner bases that contention on the court of appeals' statement that "the United States 'conceded that if Haley induced [petitioner's] firing, he acted outside the scope of his employment' with the U.S. Forest Service." Pet. 18-19 (quoting Pet. App. 3a). In making that statement, the court of appeals may have relied on the acknowledgement in the appellant's brief that "the Memorandum of Understanding [between the Forest Service and LBLA] only showed that, if Haley did cause the Contractor to fire Osborn, he acted outside the scope of his employment." Haley C.A. Br. 21. That sentence, however, recognized that it would have been outside the scope of his employment for Haley to orchestrate Osborn's firing with the intent of retaliating against her for filing a DOL inquiry, as the complaint alleges. But the government has specifically disputed in this case that it would necessarily have been outside the scope of his employment for Haley to take actions that might have influenced Osborn's firing by, for example, raising concerns about her ability to be a good partner to the Forest Service. Reconsid. Mot. 8. Even assuming, *arguendo*, that influencing Osborn's firing for such reasons would have violated the Memorandum of Understanding between the Forest Service and LBLA, that would not mean that Haley acted outside the scope of his employment in doing so. See, *e.g.*, *Heuton*, 75 F.3d at 361 ("It is true that * * * posting the picture was unquestionably prohibited by the USDA, but that does not mean that the act was necessarily outside of the scope of Anderson's employment.").

scope of employment'"). In *Wood*, which involved an alleged assault and battery of a sexual nature by an Army Major against his civilian secretary, *id.* at 1123-1124, the court observed "[w]e do not see how [the Attorney General] could characterize the incidents at issue in a way that would bring them within defendant's 'line of duty,' and it has not tried to do so," *id.* at 1130.

In this case, the United States did attempt to make an argument "assuming *arguendo*" the existence of an incident, but was precluded from doing so by the district court. The United States' motion to reconsider specifically argued, in the alternative, that because it was unclear what evidence Osborn would rely on in support of her claim, it was possible that discovery could "reveal evidence supporting an argument that, *even if the allegations are true*, the alleged conduct falls within the relevant Kentucky law on scope." Reconsid. Mot. 8 (emphasis added). See *ibid.* ("*[a]ssuming, for the sake of argument only*, that Haley and Luber interacted regarding plaintiff's employment," the facts might support a conclusion that Haley's conduct was within the scope of his employment under Kentucky law (emphasis added)). For example, if Osborn offered testimony in support of her tortious interference claim that someone overheard Haley say to Luber that he thought Osborn's conduct at the May 20, 2002, meeting was inappropriate and called into question whether she was a good fit for LBLA's project with the Forest Service, the government could assume that such a conversation occurred, but contest the characterization that Haley said it with an intent to retaliate against Osborn for filing the DOL complaint or even to get Osborn fired.

The district court refused to allow the government to make that alternative argument in light of Haley's decla-

ration, in which he stated that he had not discussed with Luber Osborn's DOL complaint or attempted to influence Luber's decision to fire Osborn. Pet. App. 13a-14a. In so ruling, the district court refused to permit the government to do precisely what *Wood* endorsed, *i.e.*, to "assume *some kind of harm-causing incident*, while leaving the Attorney General free to dispute characterizations of the incident and subsidiary immunity-related facts." 995 F.2d at 1129.[6]

c. The circuit conflict on the question of the scope of the Attorney General's certification authority is somewhat stale, since no court of appeals has adopted petitioner's position since the First Circuit's divided decision in *Wood* more than 12 years ago. Since then, all four courts of appeals to have considered the question have reached the contrary conclusion, and neither the First nor Second Circuit has revisited the issue in light of the subsequent decisions of the other courts of appeals.

Moreover, the fact that the district court's order could have been reversed and the case remanded for an evidentiary hearing even under the *Wood* approach may make this case a less than ideal vehicle for resolving the

---

[6] The district court was wrong to think that the alternative argument above would necessarily contradict Haley's declaration. That declaration stated only that Haley had not spoken to Osborn "regarding the [DOL] inquiry" or "Osborn's veteran's status" and that he had not "attempt[ed] to influence [Luber's] independent decision to fire Ms. Osborn." Haley Decl. 1-2. Even if there were an inconsistency with Haley's affidavit, *Wood* does not preclude the Attorney General from making a certification on the assumption that some incident did occur, but then litigating on the ground that it did not.

circuit conflict that does exist.[7] And any uncertainty on whether a remand under *Wood* would be appropriate simply demonstrates the inherent difficulty with the distinction that is at the heart of the *Wood* decision. While the foregoing considerations weigh against certiorari, on balance, the Court should grant review.

2. a. The second question presented in the petition is whether the Attorney General's certification "conclusively" establishes the district court's removal jurisdiction, thereby barring the district court from remanding the case back to state court in the event the court ultimately rejects the certification. As noted, Section 2679(d)(2) provides that "[t]his certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal." The issue is whether the plain language of Section 2679(d)(2) controls and should be given effect by precluding the district court from remanding the case back to state court in the event the court rejects the certification of the Attorney General.

As petitioner states (Pet. 13-14), there is a square conflict on this question. Four circuits, the Third, *Aliota* v. *Graham*, 984 F.2d 1350, 1356 (Alito, J.), cert. denied, 510 U.S. 817 (1993), the Fourth, *Borneman* v. *United States*, 213 F.3d 819, 826 (2000), cert. denied, 531 U.S. 1070 (2001), the Fifth, *Garcia* v. *United States*, 88 F.3d

---

[7] The government argued in the court of appeals that if the court did not reverse the district court's decision outright and order that the United States be substituted for Haley as a defendant, the court should at least remand for an evidentiary hearing on whether Haley committed acts outside the scope of his employment. Haley C.A. Br. 29. The government did not specifically argue, however, that the case should be remanded for an evidentiary hearing under the approach adopted by the First Circuit in *Wood*.

318, 325 (1996), and the Sixth, Pet. App. 10a, have held that the district court has no authority to remand a case back to the state court should certification be rejected. The Eleventh Circuit, in *Green* v. *Hill*, 954 F.2d 694, on reh'g, 968 F.2d 1098 (1992), has held that the district court has "discretion" over whether to remand the case to the state court.

In contrast, the First Circuit, in *Nasuti* v. *Scannell*, 906 F.2d 802 (1990), held that "[i]f the district court finds that Scannell was acting *outside* the scope of his employment, it shall remand the case back to the state superior court." *Id.* at 814. The D.C. Circuit imposed the same remand requirement in *Haddon* v. *United States*, 68 F.3d 1420, 1427 (1995). In so ruling, the D.C. Circuit expressly rejected the Third Circuit's contrary holding in *Aliota*. *Id.* at 1426. There is, thus, as petitioner states (Pet. 13), a three-way split in the circuits concerning the scope of the district court's authority to order a remand.

Like the circuit conflict on the first question presented, however, the conflict on the second question is also somewhat stale. The second of the two appellate decisions adopting petitioner's position on this issue was rendered by the D.C. Circuit in *Haddon* more than 10 years ago. Since then, three courts of appeals, including the Sixth Circuit in this case, have rejected petitioner's position. Furthermore, this case is in an interlocutory posture, because the court of appeals remanded for a determination whether respondent was acting within the scope of his employment; only if the district court concludes that he was not would the question of remand to the state court have any concrete significance in this case, and that issue could be raised on subsequent review in the court of appeals.

b. Significantly, moreover, the eight Justices who joined either the plurality or the dissenting opinion in *Lamagno* read the text of 28 U.S.C. 2679(d)(2), which provides that the Attorney General's certification that the employee was acting within the scope of his employment shall be "conclusive * * * for purposes of removal," to bar remand to the state court if the federal district court overturns the Attorney General's certification. See 515 U.S. at 434 (plurality opinion of Ginsburg, J.); *id.* at 440 (Souter, J., dissenting). Indeed, the same view is also reflected in the portion of Justice Ginsburg's opinion that constituted the opinion of the Court, which was joined by Justice O'Connor. See *id.* at 432 & n.8, 433 n.10.

A plurality of four Justices—Justice Ginsburg, joined by Justices Stevens, Kennedy, and Breyer— addressed and rejected an Article III objection to this interpretation, *viz.*, that if the certification is given "conclusive" effect for purposes of removal, as required by the language of Section 2679(d)(2), "then the federal court will be left with a case without a federal question to support the court's subject-matter jurisdiction." 515 U.S. at 435. The plurality found this argument unpersuasive, concluding that the scope-of-employment issue under the Westfall Act "is a significant federal question" and that removal by the Attorney General on his certification therefore "raises [a] questio[n] of substantive federal law at the very outset" of the litigation. *Id.* at 435 (alteration in original) (quoting *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 493 (1983)). The plurality reasoned that "'[C]onsiderations of judicial economy, convenience and fairness to litigants' make it reasonable and proper for the federal forum to proceed beyond the federal question to final judgment once it has invested

time and resources on the initial scope-of-employment contest." *Id.* at 436 (alteration in original) (quoting *United Mine Workers of Am.* v. *Gibbs*, 383 U.S. 715, 726 (1966)).

Justice O'Connor, in her concurring opinion, specifically declined to join in this Article III discussion of the *Lamagno* plurality, stating that resolution of the issue was a "difficult question" that was "not presented in this case." 515 U.S. at 437.

Justice Souter dissented in an opinion in which Chief Justice Rehnquist and Justices Scalia and Thomas joined. The dissent agreed that the statutory language is clear: "there is nothing equivocal about the Act's provision that once a state tort action has been removed to a federal court after a certification by the Attorney General, it may never be remanded to the state system." *Lamagno*, 515 U.S. at 440 (citing 28 U.S.C. 2679(d)(2)). The dissent expressed the view, however, that, for this reason, judicial review of the Attorney General's scope-of-employment certification would raise a "serious" question whether the retention of jurisdiction after rejection of the United States' substitution would "cross the line" of the courts' Article III jurisdiction. *Id.* at 441.

However this Court might resolve the Article III issue, the opinions in *Lamagno* are highly instructive on the statutory remand question, even though that case did not directly raise the issue because it was initially filed in federal court. It is true that the D.C. Circuit's split decision in *Haddon* holding that remand is required post-dated *Lamagno*. But while the majority in *Haddon* recognized that the dissenting Justices in *Lamagno* had read 28 U.S.C. 2679(d)(2) to bar a remand if the district court overturns the Attorney General's scope determi-

nation, 68 F.3d at 1427, the majority failed to recognize that the plurality (and perhaps the opinion of the Court) in *Lamagno* read Section 2679(d)(2) in the same way. Other courts of appeals, by contrast, have recognized the significance of *Lamagno* in resolving this issue. See *Bornman*, 213 F.3d at 825-826; *Garcia*, 88 F.3d at 323-327; see also Pet. App. 9a (citing plurality but not dissenting opinion). In light of the opinions in *Lamagno* and the more recent trend of appellate decisions, it is possible that the D.C. Circuit and First Circuit, if presented with the question anew, would reconsider their respective decisions. And, of course, this case presents the issue in an interlocutory posture—interlocutory even as to the interlocutory issue of the appropriateness of a remand to state court, because the district court may still find the Attorney General's scope certification proper and thus moot any question of remand to the state court. Accordingly, as with the first question presented, there are considerations that weigh against certiorari to resolve the second question. On balance, however, the Court should grant review on the second question if it grants review on the first question.

c. Finally, we submit that Article III is not violated by the "conclusive" removal provision of Section 2679(d)(2). As the Court held in *Verlinden*, *supra*, the "Article III 'arising under' jurisdiction is broader than federal-question jurisdiction under § 1331." 461 U.S. at 495. The Court thus noted that, under *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), the "arising under" Article III jurisdiction is a "broad conception" under which "Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law." *Verlinden*, 461 U.S. at 492. In *Verlinden*, the Court did not "decide

the precise boundaries of Art. III jurisdiction, * * * , since the present case does not involve a mere speculative possibility that a federal question may arise at some point in the proceeding," but, rather, "necessarily raises questions of substantive federal law"—the immunity of a foreign state from suit—"at the very outset, and hence clearly 'arises under' federal law, as that term is used in Art. III." *Id.* at 493.

The Westfall Act is not a "pure jurisdictional statute," like a federal removal statute, that purports simply to accord jurisdiction over a defined class of claims or persons. See *Mesa* v. *California*, 489 U.S. 121, 136 (1989). Rather, like the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, which was at issue in *Verlinden*, the Westfall Act is "comprehensive scheme" comprising both pure jurisdictional provisions (removal) and federal law capable of supporting Article III "arising under" jurisdiction. See *Verlinden*, 461 U.S. at 496-497; see also *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004).

Specifically, like the FSIA, the Westfall Act does not merely govern access to federal court, but governs as well the type of cases that may be removed (tort cases certified by the Attorney General under Section 2679(d)(2) or in which the employee has petitioned for certification under Section 2679(d)(3)), the standard (scope of employment) for assessing the propriety of the substitution of the United States for the employee, and the consequences of such substitution of the United States (immunity from suit for the employee and applicability of all the defenses available to the United States under the FTCA). Thus, just as the FSIA "comprehensively regulat[es] the amenability" of foreign sovereigns "to suit in the United States," the Westfall Act "compre-

hensively regulat[es] the amenability" of federal employees to suit in both federal and state courts. *Verlinden*, 461 U.S. at 493. As *Verlinden* holds, the presence of such a comprehensive regulatory scheme is alone sufficient to pass muster under Article III.

Indeed, the analogy to *Verlinden* is particularly close in that under both the Westfall Act and FSIA, "the rule of decision may be provided by state law." 461 U.S. at 491. Just as there was a strong federal interest in *Verlinden* concerning the question of what types of suits should be brought against foreign sovereigns, *id.* at 493, there is a similar undeniable federal interest in allowing federal courts to adjudicate tort actions involving federal employees who have been certified by the Attorney General as acting within the scope of their employment. See *Lamagno*, 515 U.S. at 426.

That federal interest in giving the Attorney General's certification "conclusive" effect is particularly strong under the district court's approach to the first question presented. Even if the Attorney General's scope-of-employment certification is determined to be inappropriate based upon the particular facts so far alleged by Osborn in support of her claims, it is entirely possible that discovery will reveal that plaintiff intends to rely on evidence of purportedly tortious acts by Haley that *were* within the scope of his employment, such as complaining to Luber about Osborn's conduct at the May 20, 2002, meeting. Thus, because there is an ongoing possibility that substitution would become appropriate under *Wood* depending upon what new evidence the plaintiff offers regarding the defendant's conduct, the federal question will be present throughout the litigation. In this respect, it is perfectly understandable and appropriate for Congress to accord "conclusive[]" weight

for removal purposes to the Attorney General's certification that the defendant acted within the scope of his employment, while providing for remand to state court where the Attorney General has removed the case solely to defend against a petition for certification over his objection.

Finally, as the plurality observed in *Lamagno*, there are sound practical reasons to keep the case in federal court after the scope determination is made. Remanding the case to state court would waste judicial resources, both in the federal court, which would have already become familiar with the case, and in the state court, which would have to duplicate that familiarity upon any remand. As the plurality noted in *Lamagno*, by making the Attorney General's certification "conclusive[] * * * for purposes of removal," 28 U.S.C. 2679(d)(2), Congress "decided to foreclose needless shuttling of a case from one court to another." 515 U.S. at 433 n.10.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
BARBARA HERWIG
MARK W. PENNAK
Attorneys

FEBRUARY 2006